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International Law and Transnational Legal Orders: Permeating Boundaries and Extending Social Science Encounters

Gregory Shaffer* & Terence C. Halliday†

Abstract

This Essay elaborates in three ways the call for a renewal of social science approaches to international law advanced by Daniel Abebe, Adam Chilton, and Tom Ginsburg. First, while we affirm the importance of what they call the “scientific method” of hypothesis testing, we argue that it can and must be complemented by several other well-institutionalized social science approaches to international law. Second, we loosen the conventional “internal”/“external” distinction in legal scholarship and make the case that conceptualization and empirics are integral to both approaches. Third, we propose that the full promise of social science approaches to international law can only be realized when the international is held in dynamic and temporal tension with the national and local. Expanding scholarship on transnational legal orders and ordering brings theory and research on international law (including conventional “internal” approaches) into productive engagement with growing bodies of socio-legal research and scholarship (the so-called “external” view), with mutual benefits for both. The Essay illustrates the promise of the transnational legal order framework with two illustrations, one from international trade law through the World Trade Organization and the other from international commercial law created and promulgated by United Nations Commission on International Trade Law.

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I. INTRODUCTION

This Essay responds to the call for a renewal of social science approaches to international law advanced by Daniel Abebe, Adam Chilton, and Tom Ginsburg.¹ In their framework essay to this symposium, they define “the conventional social science approach to law” as “clearly stating a research question, developing hypotheses, using a research design to test that hypotheses based on some form of qualitative or quantitative data, and presenting conclusions, all while acknowledging the assumptions upon which they are based and the level of uncertainty associated with those results.”² They label this form of research an “external approach to law,” which they (conventionally) contrast with “internal,” “doctrinal” scholarship that is “descriptive” and “normative.”³ They then illustrate their argument with empirical studies of international law involving such issues as whether Bilateral Investment Treaties lead to increased investment flows between the countries that sign them, the effectiveness of international human rights agreements, and the efficacy of international dispute resolution.⁴

Our Essay elaborates their call for social science in three ways. First, while we affirm the importance of what they call the “scientific method” of hypothesis testing, we argue that it can and must be complemented by several other well-institutionalized social science approaches to international law. Second, we reconceive the links between internal and external approaches to international law by proposing that conceptualization and empirics are integral to both approaches. We thus loosen the conventional “internal”/“external” distinction in legal scholarship, which is reflected in their essay and in critiques of the empirical approach that they advocate. Third, we propose that the full promise of social science approaches to international law can only be realized when the international is held in dynamic and temporal tension with the national and local, thus also permeating the international/national law dichotomy as reflected in methodologically nationalist scholarship. Processes of transnational legal ordering and the rise and fall of what we conceptualize as “transnational legal orders” (TLOs) bring theory and research on international law (including conventional “internal” approaches) into productive engagement with growing bodies of socio-legal research and scholarship (the so-called “external” view), with mutual benefits for both. In these ways, our approach can provide a bridge between those

¹ Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law and Its Applications*, 22 CHI. J. INT’L L. 1 (2021). As they note, such empirical study was earlier extensively surveyed and assessed in Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Law Scholarship*, 106 AM. J. INT’L L. 1 (2012).

² Abebe et al., *supra* note 1, at 5.

³ *Id.*

⁴ *Id.* at 16–17, 21.

adopting internal (doctrinal) and external (empirical) approaches to international law.

II. AMPLIFYING “THE SOCIAL SCIENCE APPROACH TO INTERNATIONAL LAW”

Abebe, Chilton, and Ginsburg present a particular version of “social science” based on deductive reasoning in which hypotheses are developed and tested. There are clear advantages to the deductive approach that they highlight. The researcher aims to be objective, posits a hypothesis, gathers data, and lets the data speak, either confirming or disproving hypotheses. In the process, this work can (and should) inform social decision making.

While this aspect of social-science engagement with law has many merits and is a critical component of a comprehensive project, a review of the extensive anthropological,⁵ sociological,⁶ political science,⁷ economic,⁸ and sociolegal⁹ literatures on international law and institutions demonstrates that a multiplicity of methods and theories compose the richly textured promise of social science for the study and practice of international law. First, the complementarity of other empirical approaches is necessary because frequently, the most important questions cannot readily be reduced to quantitatively measurable variables. Even if they can be, there is an absence of valid and reliable data on cross-sectional or time-series studies of states and supranational institutions. Second, this complementarity is necessary because the ability to produce a verifiable theory relies on prior stages of understanding, concept development, and hypothesis production, and likewise depends upon later types of empirical research to make meaning of results that all too often are conflicting, ambiguous, or lacking in much

⁵ See, e.g., GALIT SARFATY, *VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK* (2012); SALLY MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

⁶ See, e.g., GREGOIRE MALLARD, *FALLOUT: NUCLEAR DIPLOMACY IN AN AGE OF GLOBAL FRACTURE* (2014); JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNALS* (2003); JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000).

⁷ See, e.g., ABRAHAM NEWMAN & HENRY FARRELL, *OF PRIVACY AND POWER: THE TRANSATLANTIC STRUGGLE OVER FREEDOM AND SECURITY* (2019); BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); Emilie Hafner-Burton & James Ron, *Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes*, 61 *WORLD POL.* 360 (2009).

⁸ See, e.g., DANI RODRIK, *ECONOMICS RULES: THE RIGHTS AND WRONGS OF THE DISMAL SCIENCE* 118, 144 (2015) (stressing that useful economic analysis requires choices among models that involve both science and craft).

⁹ See, e.g., GREGORY SHAFFER, *EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW* (forthcoming 2021); Alexandra Huneus, *Pushing States to Prosecute Atrocity: The Inter-American Court and Positive Complementarity*, in *THE NEW LEGAL REALISM: STUDYING LAW GLOBALLY VOL. II* 225, 228–29 (Heinz Klug & Engle Merry eds., 2016).

explanatory power.¹⁰ Hypothesis testing therefore is neither the starting point nor the ending point of social science work, but rather one important component of ways that social science can address law's relationships with society, politics, and the economy.¹¹

The embeddedness of hypothesis testing in a wider multi-faceted enterprise of social science can be seen in the development of an extensive body of interdisciplinary scholarship in the past several years on the normative development, rise, contestation, and fall of TLOs.¹² This line of research and theory arose from an intuitive sense that a new framework was needed to understand and address the scope and diversity of social, economic, civil, health, environmental, and other problems that engage law across national frontiers, and in which international law is a component. The empirical realities of legally salient issues within and beyond the state required a theoretical framework that could reach across the entire landscape of problems purported to be susceptible to resolution or mitigation with the assistance of international hard and soft law. In addition, the diversity and dynamism of real-world issues demanded a framework that synchronically and diachronically embraces international, national, and local law, because normative development within these planes is inextricably intertwined in practice in ways that have grown over time.

From a social science perspective, the TLO framework emerged initially with an awareness that specific hypotheses or highly abstract frames respectively provided no systematic way to compare, contrast, and learn from developments in areas of law involving social problems from which one could build conditional theory subject to empirical confirmation, refinement, or disconfirmation, including for purposes of problem-solving.¹³ We began with a high-level concept, "order," and both processual ("ordering") and institutional ("orders") expressions of this concept, which could bring sociological and legal frames to encompass the bewildering diversity of social problems and their relation to law, regulation, and governance. Here we consciously displaced an exclusive focus on *international law* by situating international law within the frame of *transnational legal ordering*. We

¹⁰ See, for example, studies on the question of whether international investment agreements induce greater flows of foreign direct investment, a topic raised both in Abebe et al., *supra* note 1, and Shaffer & Ginsburg, *supra* note 1. *But see* JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN & MICHAEL WAIBEL, *THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME* 155–79 (2017).

¹¹ *But see* CARLO ROVELLI, *SEVEN BRIEF LESSONS ON PHYSICS* 23 (2014) ("Science begins with a vision. Scientific thought is fed by the capacity to 'see' things differently than they have previously been seen.").

¹² *TRANSNATIONAL LEGAL ORDERS* (Terence C. Halliday & Gregory Shaffer eds., 2015).

¹³ Shaffer & Ginsburg, *supra* note 1 (discussing the importance of developing conditional theory in the study of international law).

brought old (“institutionalization”) and new (“recursivity”)¹⁴ social science concepts to channel empirical research across and within conventionally defined subject areas of law, which then could be compared for the purposes of broader theory development.¹⁵ We refined these further with the specification of inductively derived mechanisms that have been observed to drive cycles of legal change beyond the state until they reach a kind of moving equilibrium (or relative “settlement”) in what we characterize as a TLO.

While we elaborate further elements of this framework for social science engagement with international law below, suffice it to say here that this phase of theory development owes more to a Weberian genre of social science research on law than to a particular genre of strict hypothesis testing in contexts where quantitative data are already available or can be constructed.¹⁶ It is a phase of inductive extrapolation and synthesis, of concept development and invention, of proposals for encompassing theory that may offer frames, then propositions, and press ultimately toward specific hypotheses that may be tested. In fact, in the first round of case studies using TLO theory, scores of hypotheses emerged, all susceptible to some form of historical, qualitative, or quantitative examination, that can be pursued in the refinement of such theory.¹⁷ Therefore, we contend that social science approaches importantly include framework construction, concept elaboration, as well as hypothesis generation and testing, involving both deductive and inductive reasoning.

This expansive understanding of social science extends to methods.¹⁸ While we share with Abebe, Chilton, and Ginsburg an appreciation of multiple social

¹⁴ Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOCIO. 1135 (2007).

¹⁵ For studies across different areas, see TRANSNATIONAL LEGAL ORDERS, *supra* note 12; TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE (Gregory Shaffer ed., 2013). For studies within a particular area of law, see TRANSNATIONAL LEGAL ORDERING OF CRIMINAL JUSTICE (Gregory Shaffer & Ely Aaronson eds., 2020); Tom Ginsburg, Terence C. Halliday & Gregory Shaffer, *Constitution-Making as Transnational Legal Ordering*, in CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 1 (Gregory Shaffer, Tom Ginsburg & Terence C. Halliday eds., 2019); Seth Davis & Gregory Shaffer, *Theorizing Transnational Fiduciary Law*, 5 U.C. IRVINE J. INT’L, TRANSNAT’L & COMPL. L. 1 (2020) (introducing a symposium issue). For a study of the globalization of legal education that reflects and feeds into these processes, see BRYANT GARTH & GREGORY SHAFFER, *THE GLOBALIZATION OF LEGAL EDUCATION: A CRITIQUE* (forthcoming 2021).

¹⁶ See MAX WEBER, *LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., Edward Shils trans., Harvard University Press 1954) (1925).

¹⁷ See Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS, *supra* note 12, at 518–24. On the importance of emergent analytics involving “discovery,” see Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 85, 119–21, 131, 136–37 (2009).

¹⁸ There are debates within the social sciences regarding the relative advantages and disadvantages of deductive and inductive approaches, as well as whether social science can aspire to theory testing

science methods, we posit that the methodological norm in social science research embraces an array of qualitative methods as commonly as quantitative methods, which do not necessarily involve hypothesis testing, but also concept development, hypothesis formulation, and discovery. Systematic interviewing, participant observation, archival research, and systematic textual analysis, among others, are conventionally deployed in leading schools of the social sciences with the recognition that a privileging of a particular method leads less to a richer empirical understanding of issues than to a constriction of realms of empirical inquiry. But what is common to all these methods is that they form part of a larger process of social inquiry that includes some form of empirical verification, even if a problem, data set, or method cannot yield a hard quantitative result.

In sum, where we have common ground with Abebe, Chilton, and Ginsburg is, first, in their call for empirical research that includes hypothesis testing. Second, we agree that such research should start with a social problem, not a mere intellectual one. We stress, however, that researchers should recognize that the very conception of social problems involves social constructions implicated by ideology, politics, and social positioning, reflecting a researcher's background, interests, and proclivities.¹⁹ Just as Anthea Roberts noted how international law is not “international” in that different national traditions reflect and propagate different conceptions of international law,²⁰ so the conceptualization of social problems and thus the variables that measure how effectively problems are addressed will reflect a researcher's positioning. The very framing of an issue as a problem constitutes an intervention in the world to the extent that the researcher intends her research to be relevant and useful.

III. PERMEATING THE INTERNAL-EXTERNAL BINARY FROM THE PERSPECTIVE OF PRACTICE

Abebe, Chilton, and Ginsburg build upon a longstanding distinction between “internal” views of international law, which are characterized by descriptive, normative, and doctrinal analysis, and “external” approaches, which

in the same way as the natural sciences. See, e.g., BENT FLYVBJERG, MAKING SOCIAL SCIENCE MATTER (2001); IAN SHAPIRO, THE FLIGHT FROM REALITY IN THE SOCIAL SCIENCES (2005). In practice, inductive and deductive work always interact. Inductive probing leads to new hypotheses; and hypotheses inform inductive probing. As John Dewey stressed, researchers revise hypotheses through experience in response to the social problems they study. John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 24–26 (1924).

¹⁹ Cf. Pierre Bourdieu, *Participant Objectivation*, 9 J. ROYAL ANTHROPOLOGICAL INST. 281, 283 (2003) (“What needs to be objectivized [] is . . . the social world that has made both the anthropologist and the conscious or unconscious anthropology that she (or he) engages in her anthropological practice.”).

²⁰ See generally ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017).

examine the law from the outside, how it came to be, and its consequences.²¹ Our research indicates that it may be time to loosen this distinction from the perspective of actual practice. To start, breaking down this binary will constructively expand the contributions that social science can make to internal as well as external legal questions. In addition, from a pragmatist perspective of social science and social action, both internal and external approaches have more in common than indicated by a strict separation. In particular, both operate within particular social contexts, and both conceptualize and aim to address perceptions of particular social problems.

On the one hand, for too long sociologists and other social scientists treated the internal processes of lawmaking, and, even more, the very substance and form of international law itself, as a black box—a region of activity colonized by lawyers and left to their exclusive epistemological claims. This separation of study suited the lawyers because it erected a fence around their mostly invisible doings. Our work, in part, aims to show how the social scientist can constructively open up this black box and reveal how doctrinal development can be leveraged as instances of behavior subject to social science inquiry.

Extending a line of scholarship on the rhetorical properties of global legal norms and scripts,²² Block-Lieb and Halliday show that the varieties of law produced by the United Nations Commission on International Trade Law (UNCITRAL)—legislative guides, model laws, treaties—comprise a repertoire of rule-types, embedded in other rhetorical contexts such as preambles and glossaries.²³ These texts reflect, on the one side, an adaptation to the political challenge of finding global consensus on legal norms, and, on the other side, a prospective anticipation of what institutions (courts, executive agencies, legislatures) in nation-states could accept as international normative guidance to bring national law into concordance with such global norms.²⁴

This work illustrates how a mere description of either the substantive or doctrinal elements of international hard and soft law fails to capture the fullness

²¹ Taking from H.L.A. Hart, Abebe, Chilton, and Ginsburg define “an ‘internal’ view of international law,” as “an approach that, whether descriptive or normative, is at its core a doctrinal exercise—as opposed to an ‘external’ view of international law—that is an approach that examines the law from outside, seeking how it came to be or what its consequences might be in the real world.” Abebe et al., *supra* note 1, at 5.

²² See SUSAN BLOCK-LIEB & TERENCE C. HALLIDAY, *GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE CRAFTING OF WORLD MARKETS* 227 (2017); Terence C. Halliday, Susan Block-Lieb & Bruce G. Carruthers, *Rhetorical Legitimation: Global Scripts as Strategic Devices of International Organizations*, 8 SOCIO-ECON. REV. 77 (2010); Alexander E. Kentikelenis & Leonard Seabrooke, *The Politics of World Polity: Script-writing in International Organizations*, 82 AM. SOCIO. REV. 1065 (2017).

²³ See generally BLOCK-LIEB & HALLIDAY, *supra* note 22.

²⁴ See TERENCE C. HALLIDAY & BRUCE CARRUTHERS, *BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS* (2009).

of ideological, political, and problem-solving work internalized in the very formal character of the law itself, whether looking back on where the law came from or looking forward to where the law is directed. When the substantive provisions of these laws are matched with the normative and material interests of lawmakers and the ecological dynamics of lawmaking processes, the normativity of law opens up more fully to social scientific exploration. In a pragmatic logic almost as strong as the “should” in normative approaches to law, a close examination of international law’s doctrinal content and form can be posed by the social scientist as a contingent proposition: if actors want a given outcome (as a normative ideal or pragmatic aim), what will be the substantive and formal properties of the law most likely to bring it about? This task is firmly within the epistemological mandate of both the social sciences and internal participants in legal processes. In other words, “internal” actors developing, interpreting, and critiquing international hard and soft law texts are highly interested in so-called “external” questions. Additionally, empirical research can be valuable for understanding and adapting the doctrine to dynamic changes in the world with which law interacts.

Similarly, through systematic interviewing, Shaffer found that internal actors are equally interested in understanding the processes that he studies, as they were “themselves engaged in quasi-social scientific ‘studies’ of the same processes.”²⁵ They too wished to understand and respond to legal processes and the issues that they address. They too aimed to “make sense” of developments in the trade law world that he studied, as they must respond to a continuously unfolding present on partial information in real time. They were interested in his work for the insights it might provide for the tasks before them.²⁶ Internal work, from this perspective, involves more than doctrine, but includes the relation of doctrine to concrete areas of legal practice.²⁷

As legal realists have long stressed, internal and external approaches often mesh in practice.²⁸ Within the concept of internal approaches, we include both

²⁵ Shaffer, *supra* note 9, at xiv (quoting Douglas R. Holmes & George E. Marcus, *Para-Ethnography*, in 2 THE SAGE ENCYCLOPEDIA OF QUALITATIVE RESEARCH METHODS 595 (Lisa M. Given ed., 2008)) (“By treating our subjects as collaborators, as epistemic partners, our analytical interests and theirs can be pursued simultaneously, and we can share insights and thus develop a common analytical exchange.”).

²⁶ Stewart Macaulay earlier documented the dilemma lawyers found in developing, applying, or ignoring contract law in the U.S. domestic context in relation to business goals. Stewart Macaulay, *Non-Contractual Relations and Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55 (1963).

²⁷ BRIAN TAMANAH, REALISTIC SOCIO-LEGAL THEORY 194 (1995) (“The notion of practice is an essential concept for a realistic approach because it joins behavior (activity) with interpretation (the meaning which informs the activity).”). Tamanaha nonetheless conceived of an internal/external divide in terms of the observer (participant or non-participant) and the observed (internal or external view of the practice). *Id.* at 177.

²⁸ See Gregory Shaffer, *The Legal Realist Approach to International Law*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS (Jeffrey Dunoff & Mark Pollack eds., forthcoming 2021).

positivist doctrinal approaches and the internal work of instrumental actors that draft and interpret legal texts.²⁹ Instrumental actors, by definition, aim to define, interpret, and shape legal norms in light of their conception of a problem, and thus are concerned with assessing the empirical implications of norm formulation and norm application. Doctrinal internal approaches may purport not to be instrumental, but even so, they vary in the extent to which they expressly or implicitly take context into account. Legal positivists such as H.L.A. Hart address the social meaning of texts which implicitly reflects context.³⁰ Even Ronald Dworkin can be viewed, in part, as adopting a Weberian concept of *verstehen* (or understanding) when he characterizes an “internal point of view” as that of those engaged in legal argumentation—that is, those participants engaged in the “constructive interpretation” of law’s meaning.³¹ In a related Weberian vein, sociologist Roger Cotterrell contends that “in order to understand law, the legal sociologist has to understand it as a participant, or as a participant does, or rather as many different kinds of participants do—lawyers or citizens, for example, living in the world of law.”³² We would not go so far as to say “must,” as the stance depends on the empirical question asked, and whether one adopts a Weberian-interpretivist or Durkheimian-positivist position on social science. As argued in Section II, we call for a broad tent in conceptualizing social science approaches to law. Nonetheless, many social science studies of law would benefit from a closer understanding of the legal process.

Those adopting an internal approach participate in a social process in which they aim to contribute to the understanding and elaboration of legal norms. They help define, explicate, elaborate, and otherwise shape the meaning of legal norms as applied to different contexts. They do so at the international level, whether through the presentation of legal briefs and arguments before international tribunals and the rendering of decisions by these tribunals, or at other stages in the legal process, whether through treaty drafting, the development of non-

²⁹ Charles Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203, 1209–10 (2015) (noting that Hart also characterized the distinction as between genuine versus instrumental rule followers).

³⁰ See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* vii, 113 (1961) (explaining that one of the two “minimum conditions necessary and sufficient for the existence of a legal system” is that “its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials” and characterizing this work as “descriptive sociology”).

³¹ Compare RONALD DWORKIN, *LAW’S EMPIRE* 13, 52–53 (1986) (discussing constructive interpretation involving justification and fit), with MAX WEBER, *SELECTIONS IN TRANSLATION* 18–19 (W.G. Runciman ed., Eric Matthews trans., 1978), and MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 88 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1964) (defining *verstehen*). Similarly, the philosopher John Rawls stresses the role of “reflective equilibrium” in theorizing. See JOHN RAWLS, *A THEORY OF JUSTICE* 20 (1971).

³² ROGER COTTERRELL, *LAW’S COMMUNITY* 369–70 (1996).

binding model agreements and guides for national legislators, the formulation of indicators to measure national and business compliance with legal norms, or the drafting of studies (such as by the U.N. International Law Commission presented to the U.N. General Assembly or by U.N. Special Rapporteurs presented to the U.N. Human Rights Council). Other bodies reference these texts at the international, national, and local levels (including domestic courts), further conveying, embedding, and reshaping legal norms as part of a transnational process. Scholarly doctrinal analysis, in turn, aims to further critique, refine, and otherwise influence such normative development.

Legal realists, working in the pragmatist tradition, contend that all norms are developed in social and political contexts and they must be subject to constant evaluation based on experience, which drives norm development.³³ Hanoch Dagan, for example, conceptualizes the legal realist understanding of law in terms of the constitutive tensions between internal and external factors, namely those of reason and power, legal craft and empirics, and tradition and progress.³⁴ Legal realists combine empirical analysis of law with internal decision making and critique in light of the social context to which law is applied.³⁵ Empirical work can be ignored, diagnostics can be based on plausible folk theories,³⁶ and law can be

³³ Those working in a legal realist tradition, from Holmes, Cardozo, and Llewellyn, to contemporary legal scholars, focus on the application of texts to social facts. Compare Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (establishing the bad man theory of law), with BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 179 (1921) (contending law is subject to an “endless process of testing and retesting”), KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 60 (1960) (studying law “as it works”), and Nourse & Shaffer, *supra* note 17 (on the importance of conditional theory and emergent analytics in relation to social facts).

³⁴ Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607 (2007). Relatedly, Brian Tamanaha shows how legal realists have been mislabeled as radical skeptics of law, whereas, although they were critical of legal doctrine not adapted to social context, they believed that law can serve as an “instrument” to advance “the social good,” and they “fervently labored to improve it.” BRIAN TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 93–94 (2010).

³⁵ In this vein, the pragmatist philosopher John Dewey stressed the importance of combining internal principles and external analysis in legal decision making, writing:

For the purposes of a logic of inquiry into probable consequences, general principles can only be tools justified by the work they do. They are means of intellectual survey, analysis, and insight into the factors of the situation to be dealt with. Like other tools they must be modified when they are applied to new conditions and new results have to be achieved. Failure to recognize that general legal rules and principles are working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations, explains the otherwise paradoxical fact that the slogans of the liberalism of one period often become the bulwarks of reaction in a subsequent era.

Dewey, *supra* note 18, at 26.

³⁶ Terence C. Halliday, *Plausible Folk Theories: Throwing Veils of Plausibility over Zones of Ignorance in Global Governance*, 69 BRIT. J. SOCIO. 936 (2018).

simply expressive and symbolic,³⁷ which is why empirics are important. Nonetheless, when actors aim to develop norms to shape behavior, they benefit from empirics. A realistic conception of law is not either/or (internal reason or external agency and structure), but both at once. Such an approach is particularly important for the development of processual theorizing and pragmatic problem-solving in which social contexts change.

Most importantly, the danger of insisting on too tight of a dichotomy for both doctrinal and empirical scholarship is that it cuts off inquiry, rather than opening up new spaces for investigation and critique. As Charles Barzun writes, the internal/external distinction

rarely serves as a useful conceptual tool to clarify issues or open up avenues of inquiry. Instead, it operates mainly as a rhetorical weapon whose function is to insulate particular substantive views from arguments deemed to be threatening to it. Its tendency has thus been to cabin scholarly debate about the nature and purposes of law, rather than to widen it, and to dampen original thinking about such questions, rather than to stimulate or provoke it.³⁸

By loosening the distinction, more legal issues become relevant for empirical inquiry, and better understanding of legal practice will inform more nuanced empirical analysis.

IV. RESEARCHING TRANSNATIONAL LEGAL ORDERS AND ORDERING

The framework of studying norm development and change through transnational legal ordering processes illustrates the rich possibilities open to empirically oriented scholars. Traditionally, international law focused predominantly on interstate relations—“the law of nations”—such as regards territorial sovereignty, the treatment of foreign nationals’ person and property, and war and peace.³⁹ Abebe, Chilton, and Ginsburg’s essay, though grounded in our time, still tends to focus on traditional international law between nation-states. Over time, however, the scope of international law expanded to cover most substantive areas of law, from human rights and criminal law to regulatory law and business transactions. In parallel, the scale of international norm-making swelled, as actors aimed to use international hard and soft law and processes to

³⁷ MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964).

³⁸ Barzun, *supra* note 29, at 1209–10; *see also* Pierre Schlag, *Normativity and Politics of Form*, 139 U. PA. L. REV. 801, 920 (1991) (“[T]he rhetorical conventionality of the inside/outside distinction and its derivative, the internal/external perspective, have enabled controversial matters to be assumed into and out of existence without being questioned.”).

³⁹ Read, for example, the table of contents of 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE, PEACE* (1905) and 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE, WAR AND NEUTRALITY* (1906).

reach deep into state law and institutions.⁴⁰ Today, international law is an instrument for social ordering that involves much more than relations among states, as international law now addresses most areas of social life. The expanded scope and scale of international law—its breadth and depth—opens a vast array of subject areas for empirical study.

To study these developments, we created a theoretical framework that places international law in a broader transnational perspective, one that builds from empirical work and, in turn, develops hypotheses for further empirical investigation. In this work we develop a framework for the study of the transnational development of legal norms in which international law plays a role. By transnational legal ordering, we refer to the processes through which legal norms are framed, propagated, settled, institutionalized, contested, and changed transnationally. These processes can give rise to what we call a TLO—a collection of *legal* norms and associated organizations and actors that *shape* the understanding and practice of law across national jurisdictions in a particular field.⁴¹ These norms are not static, but dynamically and recursively change within a transnational context in which norm making and practice at the international, national, and local levels interact. In a series of books and articles, we have applied this framework with others to a broad array of issue areas, ranging from regulatory and private law to constitutional and human rights law.⁴²

The TLO framework, with its emphasis on legal orders and ordering, brings an integrated sociolegal vocabulary and method to international law thoroughly grounded in social science. Researchers begin by identifying how agents of legal change frame a problem to be mitigated by law, a characteristic method of sociologists and anthropologists. If a settled TLO is the goal of policy entrepreneurs, researchers must discover which longer-term facilitating circumstances and shorter-term precipitating conditions thrust an issue onto policy agendas beyond nation-states. Through different empirical research methods, law and social science scholars observe how actors mobilize to address economic, social, political, and other problems through means that entail international law. Research will reveal which combinations of substate, state, and supra-state actors, together with non-state, civil society and market actors, engage each other in a bid to produce legal responses. Reflecting normative and material interests, actors at different levels of social action—local, national, and

⁴⁰ Gregory Shaffer & Carlos Coye, *From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders*, in THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP'S BOLD PROPOSAL 126 (Peer Zumbansen ed., 2020).

⁴¹ TRANSNATIONAL LEGAL ORDERS, *supra* note 12, at 5 (defining a TLO as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions”).

⁴² See *supra* note 15.

international—engage in transnational legal-ordering processes often through a mix of cooperation, competition, and conflict.⁴³

An empirically grounded conditional theory will assess the circumstances in which an institutionalized TLO emerges. A TLO consists of more than a codified body of international law; it exhibits perceptible concordance of legal norms across transnational, national, and local levels of lawmaking and practice. Such legal ordering is constantly in motion. Legal change within a state or by a state can impel change in international law, just as change in international law can influence law reform by states and local institutions. Empirical research will reveal the degree to which relatively settled law results both formally and in practice, so that the law is predictable for practitioners and regulatory subjects.

We derive from TLO research on business and finance, human rights, and regulation in international law an extensive array of hypotheses which serve at least two purposes.⁴⁴ One is to underline the contingencies of TLOs: the conditions under which they rise and decline, and cooperate and compete; the circumstances in which they are propagated and resisted, and adapted and rejected; and the varieties of forms they can take in different issue-areas and in their temporal and geographical manifestations. Another is to display the extensive breadth of empirical inquiries, accompanied by the full panoply of social science methods, that open up for social scientists and legal scholars in mutually respectful partnership. TLO theory brings social science disciplines into conversation with law, and concomitantly brings scholars studying domestic legal change into engagement with counterparts studying international and transnational legal change.

V. EXEMPLIFYING SOCIAL SCIENCE SCHOLARSHIP ON INTERNATIONAL LAW WITHIN A TLO FRAMEWORK

We now briefly summarize two research projects that illustrate the empirical study of transnational legal ordering and the settlement and unsettlement of TLOs.

⁴³ Compare Gregory Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010) and TRANSNATIONAL LEGAL ORDERS, *supra* note 12 (discussing different forms of cooperative, competitive, and antagonistic alignment of legal-ordering processes), with BLOCK-LIEB & HALLIDAY, *supra* note 23 (highlighting cooperation, competition, competitive cooperation, and conflict).

⁴⁴ See, e.g., Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS, *supra* note 12, at 475, 518–24.

A. Illustration One: International Trade Law as “Public Law” and Practice

Gregory Shaffer’s forthcoming book, *Emerging Powers and the World Trading System*, exemplifies how international trade law developed through recursive interaction between domestic and international law and practice.⁴⁵ On the one hand, the United States had the greatest impact in shaping WTO norms. Many of its norms came out of U.S. law and practice, ranging from intellectual property and import relief law to the timelines for WTO dispute settlement and the organizing principles for WTO negotiations. Other countries, such as Brazil, India, and China (which are the three case studies covered in the book) adapted their laws, institutions, and professions in light of WTO norms. When they became adept at international trade law, they successfully challenged U.S. practices and resisted U.S. pressure on them, which helped catalyze U.S. disenchantment with the liberal economic order that it had been central in creating. Shaffer’s empirical study started with a problem—the role of trade law capacity in shaping norms and affecting outcomes. The work included a quantitative study based on an original survey, and systematic interviewing and participant observation over time.⁴⁶ It traced the contribution of legal capacity to the settlement and unsettlement of national and international trade law norms and practices within and across these major countries, implicating the broader international trading system.

B. Illustration Two: International Trade Law as “Private Law” and Practice

In *Global Lawmaking*, Block-Lieb and Halliday show how a social science approach to lawmaking by UNCITRAL, one of the leading international organizations that creates international private law, affirms and extends the call by Abebe, Chilton, and Ginsburg for applying social science to the study of international law, while exemplifying the potential of alliances between social science and legal scholars.⁴⁷ They begin with three transnational problems, which are framed by ecologies of actors: to save failing businesses, especially those whose assets and liabilities cross borders; to free up capital for investment in transitional and developing economies; and to forestall the emergence of regional blocs that

⁴⁵ SHAFFER, *supra* note 9.

⁴⁶ *Id.* The work illustrates the benefits of partnering with those in other disciplines (such as political science) and those embedded in other national settings (such as in Brazil, China, and India). The book’s case studies were written with Michelle Ratton Sanchez Badin (Brazil), Henry Gao (China), and James Nedumpara and Aseema Sinha (India). The underlying survey and its analysis were conducted with political scientists Marc Busch and Eric Reinhardt.

⁴⁷ BLOCK-LIEB & HALLIDAY, *supra* note 23.

govern transport of goods through international waters. They demonstrate empirically that close attention to the process of developing transnational legal orders in three areas of commercial law to address these problems—corporate bankruptcy, secured transactions, and carriage of goods by sea—shows that the distinction between the “external” and “internal” substantially dissolves. Quantitative measurement of delegations’ participation in lawmaking and rhetorical analysis and counts of substantive rule-types demonstrate ways that the external penetrates almost entirely inside the internal such that codified doctrine both reflects and anticipates the economic and social and political contexts in which it *orders* behavior through *legal* norms. The study exemplifies the necessity of triangulating methods: archival research, participant observation, interviews, textual analysis, and coding and quantitative analysis of official records and official proceedings. In so doing, it responds less to a specific hypothesis, nor is it intent on presenting new hypotheses readily tested by quantitative methods. Rather, it endeavors to amplify the power of the TLO framework, expanding and refining its theoretical elements, and presents findings about efforts to institutionalize new legal orders that approach the pragmatics of innovative global governance.

VI. CONCLUSION

In sum, we contend that law should no longer be studied in a methodologically nationalist perspective involving a sharp dichotomy of international and national norm development and practice, as reflected in predominant internal and external scholarly approaches. The national and international development of legal norms and practices transnationally intertwine and beckon for empirical study. The process of creating and elaborating the TLO framework itself demonstrates the richness of possible social science engagement with international law, including internal approaches to international law. It emerged as a way to bring some theoretical coherence to an enormously heterogeneous body of international law scholarship on a diverse array of issues framed as problems to be addressed through law. It involved the creation of new concepts—transnational legal ordering, transnational legal orders—and the incorporation of other concepts (recursivity, concordance, settling, alignment) into an integrated framework. That in turn has been creatively and critically applied by social scientists and international law specialists to business and finance, health and medicine, human rights, climate change, international crime, and fiduciary relationships. From these applications, scholars have generated scores of hypotheses and propositions on framing, rising and falling, propagating and resisting, and institutionalizing and structuring TLOs. The “testing” of these hypotheses has often not been possible by quantitative methods. More often the theory has been advanced by historical and qualitative social science empirical research. In this respect the TLO framework holds the promise of substantially

enhancing social science engagement with international law with the prospect of mutual enrichment. In so doing, it amplifies the spirit—and widens the scope—of Abebe, Chilton, and Ginsburg’s call for scholarship on international law enriched by social sciences.